Earle Industries, Inc. *and* International Ladies Garment Workers Union, AFL-CIO. Case 26-CA-8066

March 22, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On July 21, 1981, Administrative Law Judge William F. Jacobs issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[2] and conclusions [3] of the Administrative Law Judge and to adopt his recommended Order as modified herein.[4]

[1] In its brief, Respondent disputes the adverse inference drawn by the Administrative Law Judge because Respondent did not call Supervisor Glenda McCain as a witness. Respondent claims that "Ms. McCain was sick and experiencing heart trouble during the presentation of this case." The General Counsel has filed a motion to strike the quoted portion of Respondent's brief on the ground that Respondent failed to enter on the record any explanation why McCain was not called as a witness. After carefully reviewing the entire record in this proceeding, we find that the General Counsel is correct and grant the General Counsel's motion.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] We adopt, *inter alia*, the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(3) and (1) of the Act when it permanently laid off employee Early Morton for the purpose of disenfranchising her in the Board election held on June 22, 1979. In reaching this conclusion, however, the Administrative Law Judge also found as to Morton's previous layoff in 1977 that "Morton was not [laid off] because she talked with other employees instead of doing her job but because she was involved in the union's campaign." Since the complaint does not allege that Morton's 1977 layoff was discriminatory, we do not adopt this finding of the Administrative Law Judge. This conclusion does not affect our findings herein.

The Administrative Law Judge also found that our earlier decision in *Earle Industries, Inc.*, 146 NLRB 536 (1964), established that McCain and Al Chasen, Respondent's plant manager, had a propensity to engage in conduct violative of Sec. 8(a)(1). We do not adopt this finding, since the earlier decision predated the alleged violations here by some 14 years and thus is too remote to support the Administrative Law Judge's finding.

[4] In par. 1 of his recommended Order, the Administrative Law Judge uses the broad cease-and-desist language, "in any other manner." However, we have considered this case in light of the standards set forth in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), and have concluded that a broad remedial order is inappropriate inasmuch as it has not been shown that Respondent has a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. Accordingly, we shall modify the recommended Order so as to use the narrow injunctive language, "in any like or related manner."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Earle Industries, Inc., Earle, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1:

"1. Cease and desist from:

"(a) Permanently laying off or otherwise discriminatorily terminating employees in order to prevent them from casting their ballots in National Labor Relations Board representation elections.

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT permanently lay off or otherwise discriminatorily terminate employees in order to prevent them from casting their ballots in National Labor Relations Board representation elections.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Early Morton, Carolyn McClain, Virgil Wright, Mary Dorsey, and Carolyn Williams immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make them whole for any loss of pay, with interest, that they may have suffered by reason of our discrimination against them.

All our employees are free to become or remain, or refrain from becoming or remaining, members of a labor organization.

EARLE INDUSTRIES, INC.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge: This case was heard before me on August 18, 19, and 20, 1980, in Memphis, Tennessee. The charge was filed on September 27, 1979, and amended on October 25, 1979, by International Ladies Garment Workers Union, AFL-CIO, herein called the Union. The complaint issued on October 30, 1979, alleging that Earle Industries, Inc., herein called Respondent or the Employer, violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act, as amended, herein called the Act, by failing and refusing to reinstate certain employees[1] because of their activity on behalf of the Union and because they filed charges or gave testimony[2] under the Act.

All parties appeared and were afforded full opportunity to be heard and present evidence and argument. All parties filed briefs.[3] Upon the entire record, my observation of the demeanor of the witnesses and after giving due consideration to the briefs, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a corporation with an office and place of business in Earle, Arkansas, is engaged in the manufacture of closet accessories, garment bags, and other related products. Annually, Respondent, in the course and conduct of its business operations, has sold and shipped from its Earle, Arkansas, facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Arkansas and has annually purchased and received at its Earle, Arkansas, facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Arkansas. The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[1] Allegations in the complaint concerning certain of these employees were dismissed at the hearing on motion from the General Counsel.

[2] No evidence was offered at the hearing to support the 8(a)(4) allegations.

[3] The General Counsel's unopposed motion to correct the transcript is hereby granted. The Charging Party's motion to repoen the record to permit receipt of additional exhibits is denied.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

In 1963 the Union first attempted to organize Respondent's plant. In an effort to defeat the organizational drive, Respondent engaged in a number of 8(a)(1) violations:[4] threatening reprisals including threatening to close its plant, purposely creating the impression of impending plant closure in the event of union success, interrogating employees, and attempting to force employees to wear "Vote No" signs prior to a representation election. Involved in purposely creating the impression of impending plant closure for unlawful reasons were, among others, two of the principals involved in the instant proceeding: Donald Felsenthal, Respondent's president, and Al Chasen,[5] Respondent's plant manager. The Union did not succeed in its organizational efforts.

In November 1968 the Union once again undertook the organization of Respondent's employees. There is no evidence that Respondent engaged in violative conduct during this campaign. On the contrary, the Union provided Respondent at the time with a list of employees who were serving on its organizing committee, and Respondent placed in the record evidence that several of these organizing committee members quit their jobs at various times, years after this campaign, and despite their known union activity were nevertheless rehired by Respondent.

In October 1974 the Union again undertook to organize Respondent's employees. As it did in 1968, it sent Respondent another list of employees who were on its organizing committee. There is no evidence that Respondent engaged in any activity violative of the Act during this campaign. Moreover, of 27 names appearing on the Union's list of organizing committeemen, 10 of these 27 were rehired after quitting or being laid off for lack of work subsequent to the 1974 campaign.

On October 4, 1977, the Union sent a letter to Respondent demanding that it be recognized as the bargaining agent for Respondent's employees and on October 6, 1977, it filed a petition[6] with the National Labor Relations Board's Regional Office in Memphis for an election. Attached to the Union's demand letter was, once again, a list of 27 employees who were identified as members of the organizing committee. Respondent offered evidence to indicate that, of these 27 employees who served on the bargaining committee, a number who subsequently quit or were laid off were nevertheless rehired despite their known union affiliation during the 1977 campaign. This claim will be discussed *infra.*

Following the filing of the petition, an election was conducted on November 29, 1977, the results of which are not available in the record here before me. For rea-

[4] *Earle Industries, Inc.*, 146 NLRB 536 (1964).

[5] Spelled Chassen in the cited decision.

[6] Case 26-RC-5628.

sons also not available in the record, a second election became necessary and that one was conducted on June 22, 1979. The ballots of a number of employees were challenged during the election and following an investigation by the Region it was recommended that certain of them should be opened and counted. The Board substantially adopted the Regional Director's recommendations with regard to these challenges and ordered that certification issue if remaining challenged ballots were not sufficient in number to affect the results of the election. The position of the parties with regard to the challenges is instructive. With regard to 8 of the 10 challenged ballots, the Union took the position that these employees were temporarily laid off with expectancy of recall and therefore eligible voters while the Employer took the position that these same employees were permanently laid off because they had not been meeting minimum production standards except one, Carolyn McClain who had been laid off for lack of work with no reasonable expectancy of recall and therefore ineligible to vote. The record reveals that four[7] of the eight individuals challenged had been listed as members of the Union's 1977 organizational committee with Respondent receiving notification of this fact, and that five of the eight are alleged discriminatees in the instant proceeding. The General Counsel contends that, although the termination of the five named employees was not discriminatorily motivated, Respondent's failure to reinstate them was so motivated.

B. *The 8(a)(3) Allegations*

1. The layoff of Early Mae Morton

Early Morton was first hired by Respondent on June 16, 1975,[8] and was employed initially as a bundle girl[9] in the tops and bottoms department. It was her job to supply the sewing machine operators with work and to pick up the finished product from the operators when their work was completed. When Morton was asked what one had to know to be a bundle girl, she replied simply, "How to tote bags." Thus, the job was not very demanding. Morton during her first period of employment with Respondent, was described by Chasen as a good worker, a fair worker. During this period, according to Chasen, she did her work as she was supposed to do. She was not, unlike later, going around between the aisles of the operators and continually talking. Gladys Conners, the other bundle girl who worked with Morton, was called by Respondent apparently to support Chasen's testimony. She described the work that she and Morton did and compared their means of getting it accomplished. She testified that she worked with Morton on two separate occasions,[10] and contrary to Chasen stated that both times Morton exhibited a constant pattern in her work habits, "Both times were the same." Morton admitted being asked, when she was first hired, not to just stand and talk.

On October 15, 1976, Morton was laid off for the first time. She was still working in the tops and bottoms department and her supervisor was Glenda McCain. On that occasion McCain called her over to her desk about noon and told her that she was going to have to lay off one of the bundle girls and that she, Morton, was the one. McCain added that she would call her back as soon as work picked up. The notation "LOW"[11] was placed on Morton's employee card.

With regard to Morton's layoff on October 15, 1976, Chasen testified that she was let go "when it slowed down, and we didn't require her services." In effect Chasen agreed with the company personnel records that Morton was laid off for lack of work.

Based the above-described oral testimony and substantiating records, and the further testimony of Gladys Conners to be described *infra*, I find that Early Morton was considered a good worker during her first period of employment with Respondent, although she was prone to "just stand and talk" and was admonished concerning this propensity. I find also that she was laid off for lack of work and was advised that she would be recalled when "work picked up." The entry LOW noted on her employment record meant exactly what it said. She was thus a permanent employee with reasonable expectation of recall.

On September 15, 1977, true to McCain's promise, Morton was recalled. She was given her old job back as bundle girl in the tops and bottoms department. With regard to this second period of employment, Chasen testified that Morton "was not doing her work as she should have been, or as she did the first time she was with us; instead of doing her work, the work that she should have been doing, she was going around between the aisles of the operators and continually talking. As noted earlier, Gladys Conners, the other bundle girl who took McCain's place when she was off sick, testified that there was no difference between Morton's work habits during the first period she worked for Respondent and the second period. The pattern was constant. Conners stated that during both periods Morton failed to do the work which she was supposed to do; namely, carry work to and from the operators and supply them with material, thread, and oil for their machines. According to Conners, Morton, instead of doing her work, continued to hold conversations with the machine operators which took from a 1-1/2 to 3 or 4 minutes. These conversations took place not while Morton was doing her job but after she completed a particular job and lingered on before moving on to the next job. Sometimes, Conners testified, Morton would delay servicing operators while she completed less important assignments. In short, Morton, in Conners' estimation, was not efficient. As to the operators themselves, Conners stated that they would sometimes continue to work while Morton spoke to them and sometimes would stop working during the conversation.

[7] Carolyn Williams, Mary Dorsey, Virgil Wright, and Early Morton.

[8] The dates of hire and termination of each employee discussed herein are based on company records and are not in dispute.

[9] Also called a floorgirl.

[10] According to Respondent's records Morton worked from June 16, 1975, until October 1976 then from September 15 until November 18, 1977, then from October 25 until November 24, 1978.

[11] Lack of work.

When Gladys Conners was asked about her own propensity to talk while on the job, she replied that she did not hold lengthy conversations with operators but, when she did, she did not completely stop what she was doing in order to engage in discussion, rather she continued to work, then would leave to do other assigned tasks. The operators, according to Conners, continued working when she talked to them, unlike when Morton talked to them, when they sometimes stopped. Conners also mentioned a conversation which she had had with Morton during this period in which Morton complained to Conners that "McCain was getting down her back about talking so much on the job" and wanted to know why McCain did not ask Conners to stop talking. Conners, on this occasion, told Morton that it was because she kept her work going even while talking and McCain was aware that she was capable of doing that. Despite her observation that Morton was not doing her job, Conners stated that she never told any of the supervisors that Morton was not doing her job. She noted that bundle girls are paid straight time, not wages based on production. Therefore, it did not matter whether she or Morton moved 1 or 50 bundles, they were still paid the same amount.

According to Morton, the first day she came back from her layoff on September 15, 1977, she became aware that union activity was taking place at the plant. That very evening, while at an establishment called the "Mad Butcher," Morton was told by a fellow worker that the employees were trying to get the plant organized. Morton was asked if she would help, and she agreed that she would. Thereafter, Morton passed out leaflets, held most of the meetings at her house, about five or six in all, wore a union button, visited employees at their homes, and solicited signatures on union representation cards. She was a member of the in-plant organizing committee and her name appeared on the list of employees who were members of the in-plant organizing committee furnished on October 5, 1977, by the Union to Respondent.

On October 5 or 6, Glenda McCain was handed a copy of the list of employees who were members of the Union's organizing committee which included Morton's name. She was observed reading the list. From that day, according to Morton's credited testimony, McCain began to closely watch Morton's activities, including when she was going to and coming from the restroom. On occasion McCain would follow Morton to the restroom. McCain also watched Morton when she spoke to other employees. Whereas prior to October 5 McCain did not pressure Morton concerning her briefly talking to the operators about their needs, thereafter she tried to keep Morton from saying anything. Morton characterized McCain's treatment of her as "picking on her." Relations between the two cooled and the two avoided talking to each other. McCain, however, continued to carefully watch Morton and certain other employees and one day told Morton that she had better be careful. Other members of management as well as McCain stopped smiling, no longer greeted her in the morning, and acted cranky. She was forbidden to go back into the cutting department to get goods as she used to do.

From the above testimony, I conclude that Morton continued to do her work during the second period of her employment the same as she had performed her work during the first period of her employment, just as Conners noted.[12] She also continued to talk to fellow employees more than her fellow bundle girl, Conners. I find that her talking was not *per se* objectionable to her supervisor or to the Respondent, otherwise she would not have been recalled at all. Moreover, there is no indication that her talking, or even pausing while doing so, interfered in any way with production. The job was not tied to production.

I also find that Morton was heavily engaged in union activity and that Respondent was aware of her activity and attempted, through her supervisor, Glenda McCain, to keep her away from other employees by carefully watching her and forbidding her to talk to other employees. Thus, Morton's talking was not nearly as objectionable to Respondent as it claimed. Rather, McCain's pressuring her to stop talking was an attempt on McCain's part to make certain that no union activity took place on company time. I reach this conclusion based on Morton's credited testimony,[13] the fact that Morton had engaged in talking with other employees prior to her layoff and was nevertheless recalled, the sudden change in McCain's treatment of Morton following her obtaining knowledge that Morton was on the Union organizing team, and McCain's history of demonstrated union animus and propensity to engage in activity violative of Section 8(a)(1).[14]

The union election was scheduled for November 29, 1977. Approximately, 2 or 3 weeks before the election a meeting was held which was attended by certain of Respondent's employees and its attorneys. One of the individuals who was invited to attend the meeting was Gladys Conners, an employee who, it has been noted, took over Glenda McCain's duties in her absence. Other employees were not invited to attend this meeting so when Conners came out of the meeting one of them asked her what went on at the meeting. Conners replied, "All of you are going to wish you all didn't have anything to do with that Union before it's all over with."[15] She directed this statement at a group of employees which included Morton. The following week Morton was laid off.

On November 18, 1977, just before quitting time McCain called Morton over to her desk and told her that she was going to have to lay her off. Morton replied, "okay." McCain then said, "There ain't no hard feelings, is there?" Morton replied, "No." She then clocked out.

Chasen testified with regard to this layoff that he noticed several times while walking through the department that Morton, instead of doing her job, was continually talking to the machine operators. When he called

[12] Chasen's testimony to the contrary is not credited.

[13] McCain did not testify to deny any of Morton's testimony.

[14] See *Earle Industries, Inc., supra.*

[15] Conners, who testified on behalf of Respondent, with particularity, and at great length, with regard to Morton's work habits did not testify concerning this statement. Morton's description of the incident is credited.

this to the attention of the supervisor, he was told that the supervisor had tried to correct the situation but could not. According to Chasen he told the supervisor that rather than bring someone else in he would keep Morton on until it got slow, then he would just let her go. Chasen testified that the decision to let Morton go on this occasion was his own and the supervisor's. I find, however, for the reasons stated above that the evidence indicates that Morton was not terminated because she talked with other employees instead of doing her job but because she was involved in the Union's campaign. She was a known union activist and it was immediately prior to the election so there was no more convenient time for Respondent to get rid of her than at that time. Chasen's statement that it made no difference to him whether or not a union represented the employees is rejected in light of the findings in 146 NLRB 536 that he actively engaged in an attempt, in a previous campaign, to purposely create the impression among employees that the plant would close if the Union were successful in its attempt to organize.

Charges were filed with the National Labor Relations Board based on the discharge of Morton and on October 25, 1978,[16] she was reinstated in accordance with a settlement[17] agreement reached between Respondent and the Board. She was not, however, reinstated to her old job but given a job in the padded hanger department.[18] Her new job consisted of putting cotton padding on a wooden hanger, adding a perfumed pellet, then placing a satin sleeve over the whole.

Meanwhile, the representation case was proceeding concurrently. The election which had been conducted on November 29, 1977, resulted in objections and challenges being filed by the Union. A hearing was held on November 21 or 22, 1978, at which Morton gave testimony.[19] Two days later, November 24, 1978, Morton was laid off.[20] There is no indication in the record whether or not a charge was filed on Morton's behalf at this time. Presumably there was not.

On the day of the layoff, Irby McCain, Morton's supervisor,[21] called her over and told her that he was going to lay her off and that he would call her back when work picked up. At the time of her layoff two other employees[22] were also laid off. Morton's employment card contains the notation under remarks, "Laid off. LOW." Similar notations had been entered on her card when she had been temporarily laid off in the past. When Morton filed for unemployment 5 days later she entered "lack of work" as the reason given her for her layoff. On Respondent's unemployment record for Morton, its authorized representative[23] indicated similarly that lack of work was the reason for Morton's layoff. When Don Felsenthal was shown Morton's employment card he agreed that the LOW entered thereon meant lack of work. He also testified that the decision to lay off Morton was made by Chasen and Irby McCain. Chasen testified similarly.

Respondent presented several members of management as witnesses who testified concerning the work being done in the hanger department generally, Morton's work in the hanger department, and the importance of productivity in that department. Irby McCain testified that, during the approximately 10 years that he was supervising in the hanger department, he had the opportunity to observe many employees performing the job which had been assigned to Morton, and because of his experience he could tell in 2 or 3 days if she would ever be able to reach the required production standard. He stated that the standard set was 1,000 hangers[24] per day per individual, but that several employees were able to produce more than the 1,000 per day, whereas others could not, particularly if they were taken off their jobs to perform other duties. This standard, he noted, had been in existence since 1968 or 1969, and each individual who came to work in the department was advised, verbally by himself, of the necessity of producing the 1,000-hangers-per-day standard. Each new employee, according to Irby McCain, is told exactly what is expected of him, and he is given ample time to work up to the standard.

As far as training is concerned, Irby McCain testified that new employees in the hanger department have someone[25] physically sit down with them and go through the assembly process with them for 2 or 3 days after which McCain can tell by observing the speed and dexterity of the new individual whether or not she will eventually be able to make the standard. Once the new employee learns the manner of performing the operation

[16] Morton testified that she was reinstated on November 21 or 22, 1978. I am, however, relying on the dates appearing in the Company's records.

[17] Morton and Don Felsenthal so testified and Respondent's counsel so stated in her brief. Counsel for the General Counsel contends that Morton returned as a result of a "stipulation [G.C. Exh. 3] in the concurrent representation proceeding." But that document, undated, discusses "expectancy of recall" and was entered into, according to counsel for the General Counsel, on November 20, 1978. But by that date, according to Respondent's credited records, Morton had already been back on the job almost a month. Thus, it would appear that the stipulation was entered into merely as a means of determining which of the ballots of the employees named therein and challenged in the 1977 election should be counted. It did not provide for the reinstatement of Morton.

[18] There is no explanation as to why Morton was not reinstated to her old position. She had never worked in the padded hanger department before. I would suspect that Respondent wished to keep her from circulating among the employees as she did when she was a bundle girl.

[19] No portion of the representation case record was placed in the record of the instant case to show the nature of Morton's testimony.

[20] Counsel for the General Counsel notes in his brief: "Just prior to her *recall*, Morton testified at a hearing involving the representation case held November 21 and 22, 1978." Presumably, the General Counsel relies on the memory of Morton on this matter. I rely instead on Respondent's personnel records which support the text herein.

[21] Record evidence clearly indicates that Irby McCain is a supervisor. He was nevertheless later found eligible to vote. 248 NLRB 67.

[22] Louise Wright and Brenda Young. There is no evidence that these two employees were actively engaged in any union activity.

[23] Jonell Bennett, Respondent's secretary, who filled out both the employment cards and the unemployment records testified that it has "just been a practice to put laid off." Only if there had been "trouble" with someone and Chasen or D. Felsenthal told her to put a different entry would she put something else on the unemployment form.

[24] Coming close to the standard, between 950 to 1,000 was considered acceptable. D. Felsenthal also testified that 1,000 hangers was the standard.

[25] A senior employee or supervisor is constantly at the employee's side during this period, according to McCain.

she is left alone to produce on her own. It usually takes 2 to 3 weeks[26] for a new operator to become proficient.

Hanger production, in the past, had been seasonal, according to McCain. It geared up at a specific time of year and then was shut down. During this period there would be an influx of employees into the padded hanger department. These employees would produce until the required production was met, then the department would shut down.[27] Though McCain testified that slower producers were let go first and were told they were being let go for that reason, there is evidence to the contrary.[28] At the end of the year employees would be told that they were being let go because of a lack of work. When McCain was asked if any employee had ever been terminated for not being able to meet the standard, he stated that he was sure there had been, but could not think of any off hand. There were, he stated, about 12 in the department.

During its seasonal period, McCain testified that, when it was time to recall the employees, they were called back in accordance with their production, the more productive employees being called back first, the slower ones later.

With regard to Morton, McCain testified concerning her working proficiency by comparing her to a coworker, Martha Crawford, who was employed in the hanger department during the same period and also as a sleeve girl.[29] According to McCain, Crawford moved in a rhythmic fashion and was much faster than Morton. McCain testified that at the end of the day, when he noticed the amounts of production, he would comment to each of the workers about their output. The counts are kept by the sleeve girls themselves, then passed on to McCain. From his observation of these employees and from the amount of production each turned in, McCain testified that he came to the conclusion that Morton was just too slow and would not become productive within the next 5 or 6 weeks. Crawford, he stated, could and, in fact, did become a productive employee.[30] Crawford was laid off on November 20, 1978. When recalled on January 15, 1979, she was either immediately or later put to work in another department.

Chasen testified, in support of McCain, that Morton did not come up to the standard while working in the sleeve department, reaching this conclusion on the basis of production reports which he received in the ordinary course of business. He reached this conclusion when he noted that her production was "below some of the other girls." Records placed in evidence by the General Counsel seem to indicate that Morton's production was, in fact, below the other sleeve girls'. Contrary to what McCain told Morton at the time of her layoff, to the record and to precedent, Chasen testified that Morton's layoff was permanent. He admitted, however, that he never told Morton that she was permanently laid off or, in effect, discharged. Respondent's position is that Morton was permanently laid off because she was not producing. Donald Felsenthal as well as Chasen so testified. This too, Respondent contends, is the reason she was not recalled.

Morton testified with regard to production standards in the hanger department that she had never been told how many hangers to do or about the existence of any production system. Contrary to the testimony of McCain, Morton stated that she did not keep track of her production and never discussed her production with her superiors. She stated that no one ever told her that she was not producing enough. I credit Morton.[31]

In view of the above-described evidence, I conclude that Morton was temporarily laid off on November 24, 1978, for lack of work. I am convinced that it was the intention of Respondent to recall Morton at a later time when work picked up. I base this conclusion on the fact that Morton was told at the time of her layoff that she would be recalled; that the personnel records indicate that lack of work not low production was the reason for her layoff; that lack of work not low production was the reason given to the state employment security division; that Morton was never advised of the existence of any production standard; that she was never criticized or counseled about her production; and that Crawford, who Respondent compared to Morton as a far superior employee, was laid off 4 days before Morton despite her higher production.[32] If production were as important a matter as Respondent would have one believe, Morton would have been laid off before Crawford.

The reason why Crawford was laid off before Morton is probably best reflected in the testimony of Anthony J. Bonnano, a supervisor in the hanger department from October 1976 to July 16, 1979. Bonnano explained that in case of a lack of work Chasen would inform Irby McCain of the number of employees that would have to be released. McCain would then check the date of hire of all the employees, and based on the "last hired, first laid-off policy" he would inform the employees of their layoffs. Inasmuch as the layoffs of Morton and Crawford were based on a lack of work, the "last hired, first laid-off" policy was instituted as described by Bonnano. If the policy were as described by other Respondent witnesses, i.e., the least productive to be laid off first, Morton's layoff would have preceded Crawford's. Thus, Morton's layoff was based on a lack of work and was temporary.

2. The layoff of Carolyn McClain

Carolyn McClain was first employed by Respondent for a brief 2-week period in 1976. She was hired again in September 1977, quit in December of the same year for reasons of health, was rehired July 7, 1978, and was laid off for lack of work on March 21, 1979. While employed

[26] D. Felsenthal testified similarly but in his affidavit stated that it would take 2 to 4 weeks to become a good employee.

[27] The padded hanger department has been discontinued. There was some testimony from McCain as to when the department was seasonal and when it was all year round but his testimony was inexact as to dates. The department was completely shut down in late 1979.

[28] According to Respondent's records.

[29] Crawford was a new employee, hired September 18, 1978.

[30] McCain could not remember who trained Morton and Crawford nor how much time was dedicated to their training.

[31] Where the testimony of Respondent's witnesses are contrary to that of Morton, theirs is not credited.

[32] Thus Irby McCain's testimony is contradicted by Respondent's own records.

at Respondent's plant during her last period of employment, McClain was engaged in the sewing of pockets on shoe bags using a double needle operation.

McClain first became aware of the union's organizing campaign in November 1977. She testified that she handed out leaflets during the lunch break, wore a union button, signed a union card, and placed a bulletin concerning a union meeting on the bulletin board in Respondent's plant. When the Union's representative visited the plant, McClain and certain other employees[33] would meet with him across the street from the plant in a parking lot and talk with him. On these occasions she would wave at individuals[34] watching her either from the plant or as they were slowly driving by. McClain, unlike Morton and the other alleged discriminatees, was not listed as a member of the in-plant organizing committee. No one from management ever discussed the Union with McClain.

Chasen was asked during the hearing if he knew that McClain and certain other employees had been engaged in union activities. He testified that he did not know what activities these employees were engaged in. I conclude, however, that McClain's union activities[35] were so overt, as was the entire union campaign, that they most certainly had to come to the attention of management.

On March 21, 1979, according to company records, McClain was laid off for lack of work. According to McClain, at the time of her layoff her supervisor, Irma Maxwell, told her that she was going to have to lay her off for a little while.[36] When McClain returned to the plant on Friday to pick up her check she asked Maxwell whether she should report for work the following Monday. Maxwell replied in the negative and advised McClain that she would be called when there was work. It is clear from the record that this type of layoff with expectation of eventual recall was not at all unusual at Respondent's plant. Respondent's witnesses Don Felsenthal and Albert Chasen agreed that McClain was, in fact, laid off for lack of work on March 21, 1979. Unemployment records also reflect such a finding. In accordance with historical precedent, I find that McClain, being laid off for lack of work, was temporarily laid off and had a reasonable expectation of recall, and was not permanently laid off as Respondent later claimed.

3. The layoff of Carolyn Williams

Respondent's records reveal that Carolyn Williams was initially hired on April 6, 1970, then laid off, and rehired four more times. Williams' last layoff was on April 3, 1979. Of the four times that Williams was laid off, three times were for lack of work. So Respondent's records indicate. Each time she was told that she would be called when needed. The personnel records also indicate that the April 3 layoff was also for lack of work.

At the time of the April 3 layoff, Williams was working in the tops and bottoms department, as a machine operator, for Glenda McCain. McCain told her that she, Williams, would be off for a week. The following Friday, April 6, when Williams went to the plant to pick up her paycheck, Jonell Bennett advised her, as reflected by the personnel records, that she was being laid off for lack of work.[37] Subsequently, Williams filed for unemployment compensation. On the papers which she filed on March 30, 1979, Williams wrote "lack of work" as the reason for her layoff, just as she had been advised by Bennett. On the Company's unemployment papers Bennett wrote:

> To whom it may concern:
>
> There was work for her [Williams] 4-2-79. But she had business at child support office, West Memphis—Temporary lack of work starting 4-3-79. To return to work Monday 4-9-79.

Bennett signed and dated the document 4-4-79. Thus, Williams' description of events is supported by this documentation to the extent that as of April 4 she was expected to return to work on April 9, 1979. On April 13 Williams went to the plant to obtain a statement concerning her layoff to be used to apply for food stamps. Bennett supplied her with the requested document which stated: "Carolyn Williams was laid off due to lack of work[38] April 2, 1979."

Thus, the credited testimony of Williams and the Company's personnel records indicate that Williams was laid off on April 3 for lack of work and there is no indication that the layoff was for any other reason. Inasmuch as she was told initially that she would be recalled, and, under similar circumstances in the past, she and many other employees had always been recalled, I find that her layoff for lack of work was temporary in nature and that there was a reasonable expectancy that she would be recalled.

With regard to Williams' involvement in union activity, she testified credibly that she first became aware of union activity at the plant in 1977. She wore a union button, passed out announcements of one or more union meetings, and attended said meetings. She, like Morton, was listed as a member of the organizing in-plant committee. A copy of the list, as noted earlier, was supplied to Respondent[39] by the Union during the campaign.

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[33] McClain did not identify the other employees meeting with the union representative on these occasions except for her sister Patsy Bly.

[34] These individuals included Chasen, one Richard Gibson, a company official, not otherwise identified and Irma Maxwell, her supervisor.

[35] McClain testified that she had "participated a lot in union activities" and that *a few days before* her layoff "Chasen and a few others" were watching her through a window while she talked with a representative of the Union. She intimated that it was because of her meeting with the representative that she was laid off. However, since she had been engaged in similar activities since November 1977, I will give no weight to the timing of the two events, i.e., her meeting observed by Chasen and her layoff.

[36] Maxwell did not testify. McClain is credited.

[37] Bennett testified that initially she believed that Carolyn Williams, Virgil Wright, Mary Dorsey, alleged discriminatees, and employee Emma Walker were all expected to return to work on the following Monday, April 9, but that after their layoffs she was told by Glenda McCain that they were not to be put back to work on Monday, but were to remain in layoff status. When Bennett broached the subject with Chasen, he confirmed what McCain had said.

[38] When Bennett was asked why she wrote "lack of work" she testified that this was the usual entry made when there was a layoff. However, Respondent's records also contain other entries.

[39] Again, Chasen's statement that he did not know of her union activities and did not memorize all the names on the list is rejected as not

Continued

4. The layoff of Virgil Wright

Virgil Wright was originally hired on February 10, 1970; took maternity leave in 1970; was rehired in 1973; was laid off for lack of work in 1976; was rehired on August 1, 1977; and, according to Respondent's personnel records, was laid off on April 3, 1979, again for lack of work. Wright worked in the tops and bottoms department as a sewer under the supervision of Glenda McCain.

When Wright was laid off in 1976 she was advised simply by McCain that she was going to have to lay Wright off for lack of work. No other explanation was given. After the 1976 layoff Wright filed for unemployment and her claim was honored. When she returned to work for Respondent in 1977 it was again as a sewer in the tops and bottoms department under Glenda McCain.

On Monday, April 2, 1979, McCain told Wright that she was going to be laid off for 4 days, that she was to report for work Monday, April 9. However, when Wright went to the plant on Friday, April 6, to pick up her check, Bennett told her that she was laid off for lack of work and that she would be called back. Subsequently, Wright again filed for unemployment and her claim was honored. On April 6 Bennett filled out Respondent's copy of the unemployment report covering Virgil Wright's layoff. On it she noted, "Temporary lay off. Lack of work. To return to work Monday 4-9-79." Bennett testified that the information placed on the unemployment records was obtained from McCain who told Bennett that Wright and the other employees laid off on April 2 or 3 were only temporarily laid off for lack of work and that they were to check back the following Monday. Inasmuch as Virgil Wright was told initially that she would be recalled, and under similar circumstances in the past she and many other employees had always been recalled, I find that her layoff for lack of work was temporary in nature and that there was a reasonable expectancy that she would be recalled.

With regard to her union activities Wright testified that she first became aware of the organizing campaign in 1977. She participated personally in the campaign by signing a union card, wearing a union button, and becoming a member of the union organizing in-plant committee. Her name, like Morton's and Williams', appeared on the list of committee men and women supplied to Respondent by the Union. I find, Chasen's testimony to the contrary notwithstanding, that Wright was known to Respondent as a union adherent.

5. The layoff of Mary Dorsey

According to Respondent's records Dorsey was originally employed in May 1973, laid off for lack of work in April 1974, rehired in August 1975, quit in May 1975, rehired in June 1976, took maternity leave in August 1976, rehired in July 1977, and laid off for lack of work on April 3, 1979. Initially Dorsey was hired to work in the tops and bottoms department, sewing under the supervision of Glenda McCain, and worked there throughout all of her employment with Respondent.

On the occasion of her first layoff Dorsey and two or three other employees were told that they were being laid off until work picked up at which time they would be called back. She was. On Monday, April 2, 1979, just before quitting time, McCain came around and told Dorsey and the others that they would be off until the following Monday, April 9, because work was slow. When Dorsey came to the plant the following Monday she went in to get her check. Bennett, at that time, told her that she was laid off until further notice because work was slow. Bennett assured Dorsey that she would be called back. She never was recalled. I find, in accordance with precedent, Respondent's records and the testimony at the hearing, that Dorsey, like Williams and Wright, was temporarily laid off with a reasonable expectancy of recall.

With regard to her involvement in union activity, Dorsey testified that she first became aware of and began to participate in the union organizing campaign in 1977. She signed a union card, wore a pin, and attended union meetings. Dorsey, like Morton, Wright, and Williams, was a member of the in-plant organizing committee and her name appeared on the union news letter which so advised Respondent's management.

C. *The Representation Case Proceedings Since the Layoffs (Case 26-RC-5628)*

On May 11, 1979, the Board issued its Supplemental Decision and Direction of Second Election. Pursuant thereto a secret-ballot election was conducted on June 22, 1979, among its production and maintenance employees. There were 48 votes cast for the Union and 47 votes cast against it. There were 10 challenged ballots, sufficient in number to affect the results of the election, and objections to the election were filed thereafter by both sides.

Among the 10 challenged ballots were those of the 5 alleged discriminatees herein, challenged by the Board agent conducting the election on the grounds that their names did not appear on the eligibility list. The Union took the position that these five employees had been temporarily laid off, had an expectancy of recall and were therefore eligible to vote. The Respondent took the position that they had been permanently laid off because they were not meeting minimum production standards excepting that McClain had been permanently laid off with no reasonable expectancy of recall because of lack of work and that all five were therefore ineligible to vote. Respondent was able to take this position because it decided to leave the names of the five union adherents, the alleged discriminatees herein, off of the eligibility list which issued, of course, some time after the issuance of the Board's May 11, 1979, Supplemental Decision which provided for a new election. The removal of the names of these individuals from the eligibility list was the first indication in the record that Respondent considered any of these five employees to have been permanently laid off. Prior to the issuance of the eligibility list by Respondent, all indications were that they had been laid off

worthy of crediting. Respondent's management including Chasen, I find, was fully aware of the names of those employees included on the list of in-plant organizing committee men and women.

temporarily as they had in the past[40] with a reasonable expectancy of being recalled as they also had been in the past.

In a subsequent hearing of the issues, according to the Regional Director's Report on Challenges and Objections the five challenged employees "testified, in substance, that they had been laid off for lack of work, but were told that they would be called back, and three testified they were given specific dates to return; however, on that date were told work had not, as yet, picked up." This testimony, as reported in the Report on Challenges and Objections, is consistent with the testimony of the same five individuals in the instant proceeding.

According to the cited Report on Challenges and Objections, Donald Felsenthal testified that Williams, Dorsey, Morton, and Wright were permanently laid off for not meeting production standards, a procedure first instituted in January 1979, to be utilized as a basis of selection in the event of a layoff. Respondent's position with regard to these four employees in the instant case is consistent with its reported testimony during the representation case. However, with respect to McClain the Report on Challenges and Objections indicates that Felsenthal testified that McClain's production was about the same as that of the other employees and so she was chosen for permanent layoff because she was the newest employee and the least versatile. In the instant proceeding Respondent has taken the position that McClain is eligible for recall.

The Report on Challenges and Objections noted that the issues involved in the election of June 22, 1979, were the same as those which had been before the hearing officer considering the challenges following the first election wherein the parties stipulated that certain employees were eligible to vote. It further noted that the Regional file indicated that six of the employees challenged in the first election had established a history of layoff and recall and that these six employees, it was agreed by stipulation, were therefore eligible to vote. One of the six employees who was found a temporary layoff because of her history of layoff and recall and who was covered by the stipulation was Morton. The report concluded that since the history of employment of Williams, Dorsey, Morton, Wright, and McClain indicated a pattern of layoff and recall, they were seasonal employees with an expectancy of recall and were therefore eligible voters. It was recommended that the challenges to their ballots be overruled and their votes counted.[41]

The result of the conclusions and recommendations contained in the Report on Challenges and Objections which issued on August 3, 1979, if not excepted to, would have been the counting of the five ballots of the known union adherents and very probable victory for the Union. Faced with this probability Respondent excepted to the report, and on March 3, 1980, the Board issued its Second Supplemental Decision and Order[42] in which it adopted the Regional Director's recommendations as to the overruling of the challenges to the ballots of the five employees herein involved as well as two others. On March 10, 1980, following the opening of challenged ballots a revised tally issued which showed that 53 cast ballots for, and 49 against, the Union. On March 13, 1980, the Union was certified. Subsequently, the Union requested Respondent to bargain and Respondent refused contending that the Board erred in adopting the Regional Director's recommendations with respect to the challenged ballots. Counsel for the General Counsel, on June 11, 1980, filed directly with the Board a Motion for Summary Judgment. Respondent defended on the grounds stated above. On September 11, 1980, the Board issued its Summary Judgment agreeing with counsel for the General Counsel that Respondent was raising issues which had already been considered and resolved in the representation case.

The entire sequence of events, as reflected by that portion of the record described above, indicates that Respondent had, for 10 years or more, periodically laid off employees when work became slow, and historically recalled the same employees when work picked up again, that in late 1978 and early 1979 it laid off five known union adherents promising each one that she would be recalled when work picked up, just as it had done in the past. When on May 11, 1979, the Board ordered a second election, and the same was conducted on June 22, 1979, Respondent for the first time took the position that these five employees had been permanently laid off and were therefore ineligible to vote. Since all available evidence indicates that each of these employees was told specifically that she would be called back when work became available, and since Respondent's own records indicate that Respondent intended to call them back and since historically this had been the pattern in the past, it would seem quite apparent, in light of these employees' known union sympathies, that Respondent suddenly decided just prior to the election to change its past practice of recalling such employees and to convert their temporary layoffs to permanent layoffs in order to prevent their ballots from being counted.[43] Unless Respondent is able to offer an explanation which can satisfactorily overcome the *prima facie* case presented by the General Counsel as supported by the above-described evidence, I shall find that Respondent deliberately attempted to convert the temporary layoffs into permanent layoffs in order to disenfranchise prounion voters, thus not only depriving them of their right to cast a ballot but also of their right to reemployment in violation of Section 8(a)(3).

D. *Respondent's Defenses*

1. Early Morton

Respondent contends that Early Morton was permanently laid off because she talked too much when employed as a bundle girl and did not produce sufficiently as a sleeve girl. I have already discussed at great length

[40] Though McClain's layoff on March 21, 1979, was her first layoff for lack of work, she would fall into the same category as the others since historically employees who were laid off for lack of work were later recalled when work was available. Indeed, McClain was recalled later.

[41] Other challenges and one objection remained unresolved.

[42] 248 NLRB 67.

[43] These five votes clearly determined the outcome of the election. After being counted, the final tally was 53 for the Union, 49 against the Union, and 3 remaining nondeterminative challenges.

both of these contentions. I have found that neither reason is supported by record evidence. On the contrary I find ample evidence to conclude that Morton was temporarily laid off on November 24 for lack of work and that it was only to keep her from having her ballot counted that Respondent decided to convert the temporary layoff to a permanent one. The reasons proffered by Respondent as grounds for her being permanently laid off are, in my opinion, pretextual and I so find. Inasmuch as the record indicates that Morton's old job of bundle girl has, since her layoff, been assigned to various other employees,[44] Respondent has thereby failed and refused to recall her for discriminatory reasons in violation of Section 8(a)(1) and (3) of the Act.[45]

2. Carolyn McClain

From the above description of events it is clear that McClain was laid off for lack of work and that, at the time of her layoff, she could reasonably expect to be recalled. It was not, again, until McClain attempted to vote at the representation election that her status as an employee, temporarily laid off, came into question. At that time her vote was challenged because her name had not been included on the *Excelsior* list and Respondent took the position that she had been permanently laid off for lack of work with no reasonable expectancy of recall. The record reveals no situation in the past where an employee who had been laid off for lack of work was told that the layoff was permanent.

It is quite obvious that, whether or not work was available, McClain could not be called back to work after the election because Respondent had, as was the case with Morton, converted her temporary layoff of March 21, 1979, to a permanent layoff on June 22, 1979, the day of the election. To call her back thereafter would have been inconsistent with Respondent's position. Nevertheless, Donald Felsenthal was examined on the witness stand as to why she had not been recalled. In answer he replied, "Ms. McClain had not returned to even ask for a job," thus intimating that McClain had a duty to check up from time to time to see if work were available. Since Maxwell had told her, at the time of her temporary layoff, that *she would be called when there was work*, however, there appears no reason for intimating that she had a duty to return to ask for a job.[46] Felsenthal also intimated by his testimony that if McClain had, in fact, returned and asked for a job she would have been rehired. Thus, Felsenthal attempted to place the entire problem on the shoulders of McClain who had no way of knowing whether or not there was a job opening for her, and who could hardly be expected to call back inquiring about work when only Respondent knew if there were work available, when Respondent had in the past called up to advise employees about available work,[47] and when Respondent had already promised to call her when work became available. I find Donald Felsenthal's testimony on this subject matter disingenuous.

On August 3, 1979, the Region issued its Report on Challenges and Objections recommending that the challenges to the ballots of seven employees, including that of McClain, be overruled. It was presumably after this report issued that McClain visited the plant and advised Bennett that she wished to be recalled.

In September Chasen instructed Bennett to contact McClain to have her report back to work. On September 6, 1979,[48] she called McClain and asked her to return to work. McClain advised Bennett that her home had burned down, indicating thereby that she would have difficulty reporting to work, but stated that she would try to be in the following Monday, September 10.[49] Bennett agreed adding that, if McClain could not report for work on Monday, she should call in and let her know.

On Monday, September 10, however, McClain did not show up due to the difficulties created by the destruction of her home and possessions. She did not call the plant to advise management that she would not be reporting to work. Rather, she sent a message to her supervisor through her sister,[50] Patsy Bly, who advised Irma Max-

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[44] The names of employees Kay Bonds and Dorothy Atkins were referred to during the hearing in this connection. Any failure of the parties to reach an accommodation as to precisely when Morton would have been recalled but for Respondent's unfair labor practice can best be resolved in a backpay hearing.

[45] Though Jonell Bennett testified that Morton did not return to the plant to seek employment after her layoff, I find the matter of little consequence since the record indicates that historically Respondent would call employees for recall when there was an opening. Albert Chasen testified to as much.

[46] Felsenthal admitted that in the past Bennett would call employees in layoff status to advise them that there were openings if they wished to be recalled. Chasen testified that it is still Respondent's practice to contact laid-off employees to call them back to work.

[47] Jonell Bennett testified that upon direction from Chasen she would call employees in layoff status to return to work. Thus, historically it was unnecessary for laid-off employees to visit the plant or call in to determine if work was available. Donald Felsenthal similarly testified.

[48] Respondent offered a telephone bill to establish the date of the phone call. I will rely on this bill as evidence rather than on the memory of McClain or Bennett, neither of whom demonstrated an exceptional ability to recall dates.

Bennett testified that she called McClain on two occasions, once before the fire and once after her home burned down. McClain testified to only one phone call and said that it was received after the fire. She contends that the only reason she was called at all was because Respondent was aware that she would be unable to report to work since all of her possessions had been destroyed in the fire. If Bennett had made two calls as she testified to, one before the fire, this fact would clearly prove McClain's contention invalid. Since Respondent was clever enough to place the telephone bill for September 6 in the record in order to prove that a phone call was made to McClain on that day, it would certainly have put the bill in the record for the first call if one existed to disprove McClain's contention since that call was purportedly made to the same number and would also have been recorded. Since it did not do so, I will assume that only one call was made.

[49] The content of this telephone conversation appears as testified to by McClain. Where it differs from the testimony of Bennett who stated that McClain definitely promised to report for work, McClain's testimony is credited over Bennett's. Since I have concluded that there was only one phone call, I do not credit Bennett's statement that she called McClain back on September 6 to offer her more time to report for work.

[50] According to McClain, it was not unusual for employees who expected to be absent to send in word of their expected absence through relatives or friends. I credit McClain's testimony on this point. Bennett agreed that at times she would accept the word of a relative or friend concerning the absence of a coworker. I find that McClain's statement concerning her absence which was made through her sister to her supervisor was accepted at the time without question. The citing of the Company's rules on calling in was not brought to the attention of McClain or her sister at the time. No indication of displeasure was manifested, and so Respondent's reliance on the rules at the time of the hearing, I find to be a mere afterthought.

well, McClain's supervisor, that McClain could not make it to work that day. She told Maxwell that McClain would be in when she got settled. She told her own supervisor, "Maybe when she gets settled she'll come in."

There were no contacts between McClain and Respondent's management or personnel office after September 10, 1979, for over 3 weeks. McClain did not call to make arrangements to return or to determine if her job were still available. Bennett did not call McClain to find out what her intentions were. McClain's job, as far as the record reveals, was not filled immediately. On October 2, 1979, however, an applicant came to the plant and was hired to fill McClain's place.

On October 4, 1979, McClain visited the plant and asked Bennett for her job. It had taken her almost a month to get settled since she had no home, clothes, or other possessions, and four children for whom to care and provide, including some of school age. On this occasion she also talked to Chasen about getting her job back, but he[51] informed her that it had been filled. McClain asked Chasen to call her or advise her through one of her relatives if a job opened up. She told him that she was willing to take anything in the factory because she needed a job. Chasen agreed to advise her when work became available. The same day or on a later occasion she also talked with her supervisor, Irma Maxwell,[52] about getting her job back. Subsequently she also called Bennett by telephone seeking reemployment.

According to Chasen, there have been no openings in McClain's department since October 2, 1979. She is, nevertheless, he testified, eligible for recall. Felsenthal testified likewise.

From the entire situation involving McClain, I find that about the time of the election her temporary layoff was converted to a permanent layoff, which conversion is tantamount to termination. That conversion was done solely for the purpose of influencing the outcome of the election by disenfranchising an eligible voter. This type of action has been found violative of Section 8(a)(1) and (3) of the Act. *Free-Flow Packaging Corporation*, 219 NLRB 925 (1975); *Elm Hill Meats of Owensboro, Inc.*, 205 NLRB 285 (1973).

With regard to the recall of McClain on September 6, I find that there is insufficient evidence to conclude that the recall was not genuine or that if McClain had been able to promptly report within a reasonable time thereafter she would not have been immediately employed. There is no indication one way or the other in the record whether other new employees were hired for a job to which she should have been entitled between the time she was made a permanent layoff and her recall of September 6, or thereafter, except for the individual hired on October 2.[53] I shall leave the problem of precisely when McClain should have been recalled to the compliance process or, if no accommodation is properly reached, to the backpay stage of the proceedings.

3. Virgil Wright, Mary Dorsey, and Carolyn Williams

Respondent contends that Wright, Dorsey, and Williams were permanently laid off on April 4, 1979, for failure to meet production standards. James Felsenthal, the son of Respondent's president and its cost accountant, testified that he began working on a regular basis at Respondent's plant in September 1978 after obtaining a degree in business administration. Shortly thereafter, according to his testimony, he began looking at the production records and noticed that certain operators were consistently failing to produce the minimum wage. He told his father about his findings and was told in return to put it all down on paper and present it to him.

James Felsenthal testified that he followed his father's direction, first analyzed the 1979 records, then the 1978 records, and prepared a summary of his findings which was based on weekly averages of production for the piecework operators in the tops and bottoms department. According to James Felsenthal, after analyzing the production figures he decided on a "minimum production standard that he thought the company could live with." This minimum production standard, $2.50,[54] was, he testified, the product of various cost analyses,[55] including Respondent's overhead, actual cost, and the difference between the minimum wage and what the employees actually produced—the subsidies, as he termed it. This figure was supposedly decided on in February 1979.

After arriving at the minimum production standard, James Felsenthal testified that he made a list of employees who were not making or were barely making the minimum standard and took this list to his father and finally convinced his father not to keep these unproductive employees. James Felsenthal testified that this meeting with his father occurred toward the end of February or early March 1979. After the discussion with his father, J. Felsenthal stated he went to the supervisor and asked her if she thought the least productive employees on the list could improve their output.

Based on the $2.50 standard and his discussion with the supervisor, J. Felsenthal testified, employees Hildia Brown, Virgil Wright, Carolyn Williams, Mary Dorsey, Emma Walker, and Faye Myers were terminated.[56] The General Counsel does not contend nor does the complaint allege that the terminations were violative of the Act. On the contrary the General Counsel, as noted earlier, contends that there were no terminations, merely temporary layoffs.

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[51] Chasen denied that he talked with McClain on this or any other occasion. I credit McClain. Chasen denied knowledge of McClain's ever having visited the plant at all to request work. In the face of Felsenthal's admission that he was aware of her visit, I find Chasen's statement difficult to accept. Chasen in most of his testimony was singularly unpersuasive.

[52] Maxwell did not testify.

[53] I have found that the employee hired on October 2 was legitimately hired when McClain was unable to report.

[54] The minimum production standard was raised to $2.70 with the increase in 1980 of the minimum wage, according to Felsenthal.

[55] No documentary evidence was offered, no worksheets or charts to show how these analyses were prepared.

[56] Though J. Felsenthal testified that he had the meeting with his father in late February or early March at which the possibility of terminating these employees was discussed, Respondent's own records indicate that Brown and Myers no longer worked for Respondent after February 9.

During the hearing it was pointed out to J. Felsenthal that employee Louise Robbins was still employed by Respondent although, according to the list supplied by him, her production was below the minimum. J. Felsenthal's explanation was that when he discussed Robbins with her supervisor[57] he was told that Robbins was basically a repair girl who spent 75 percent of her time making repairs and that this fact would reflect adversely on her production though it was not her fault. The 1979 records indicate that, although Robbins did not spend 75 percent of her time doing repairs, she did spend a substantial amount of time doing this work. Based on what the supervisor allegedly told him, J. Felsenthal testified, Robbins was retained.

Similarly, employee Mary Lee Childs, whose production in 1978 was below the minimum standard, was retained because her supervisor,[58] as supported by Chasen, said that she was "a very versatile girl, doing many different operations" who was switched around so much that it interfered with her production.[59]

James Felsenthal, while on the stand, was asked if the existence of the new minimum production standard was communicated to the employees. He stated that he did not know, because he "wasn't present if it was." Similarly James Felsenthal was asked if there was any publication or other documentation of the standard in existence. Again James Felsenthal said that he "did not know if there was or not." He added that he did not see any, either posted or handed out. When asked whether it had ever been communicated to employees that they were subject to being laid off if they did not meet a standard, James Felsenthal testified that he did not know if it had been "put in those words." He added, without supplying particulars, that he knew that the supervisor was constantly after some people to get their production up.

This part of James Felsenthal's testimony is bothersome for if one were to grant that an employer has a perfect right to establish minimum production standards, which I do, one must then ask why he would wish to do so. The most obvious answer is that an employer establishes minimum production standards to insure greater productivity. Thus, after establishing the minimum, the employer must advise his production workers that he has established the minimum production standard, and warn them that they must produce at least the minimum or the employer will terminate the nonproductive employees and hire new ones who can produce at the standard. By establishing the minimum production standard, an employer hopes to goad his employees to greater production. But in the instant case J. Felsenthal supposedly went through the trouble of analyzing Respondent's overhead and its costs and synthesizing an entirely new minimum production standard which would permit Respondent to determine which employees were productive and which were not and then he did nothing to advise them of its existence so that Virgil Wright, Carolyn Williams, and Mary Dorsey continued to operate in the same fashion as they had for years, under the assumption that their work was satisfactory.

If, on the other hand, the establishment of minimum production standards had nothing to do with a desire to increase standards but was to be a means of sandbagging unsuspecting employees or was a mere afterthought, an employer would not advise his employees of the existence of the standard. In the instant case it would appear that since Respondent did not advise its employees of the existence of the standard its purpose was not legitimate.

James Felsenthal was asked about the 1980 standards and whether he was reviewing the production of the employees in the tops and bottoms department. He stated, "I have been looking at them, but lately I've been involved in another job to where I haven't really had time to sit down and totally analyze it." Though he went on to say that he looks at the averages every week, that Respondent was getting much better productivity from all of the employees, and that none were below the standard for 1980, I nevertheless got the distinct impression that Respondent's minimum production standard was a one time thing, that it had accomplished its purpose, and that it was no longer of particular interest.

Donald Felsenthal also testified at length with regard to productivity and the keeping of records. He, in agreement with his son, stated that Respondent "somewhere around early 1979" started to break down the production records so they could be analyzed. When this was done four to six employees were found to be producing under the minimum production standard. According to D. Felsenthal, before the early 1979 production analysis was made, supervisors could tell if an operator was only doing between 10 and 50 percent of production and these operators would be let go. However, if an operator was down only 18 or 20 percent the supervisor would not detect that and so these "girls we were constantly bringing in, rehiring, letting go when we don't need them, rehiring when we needed them; those are the girls that we finally, after we started keeping these records, we finally decided that we're no longer going to keep that level of operation, and we're going to go through training programs in the future." The decision to let the unproductive operators go was made in March 1979, D. Felsenthal stated.

Donald Felsenthal testified that the minimum production standard was increased in January 1980 to $2.90 from $2.50. An analysis of the 1980 records reveals that two other employees besides Louise Robbins have failed to produce at or above the minimum wage which indicates again that the standards are not universally applied if, in fact, they are still in effect at all.

Donald Felsenthal testified that in March 1979 it was also decided that after letting the unproductive operators go, if and when more operators were needed, if no productive ones were available, a training program would be instituted to train new employees. When D. Felsenthal was asked if anyone had, as of the time of the

[57] The supervisor did not testify.

[58] The supervisor did not testify.

[59] Although J. Felsenthal was the one to discuss with the supervisors the production of each employee and why, despite her lack of production, she perhaps ought to be kept, he denied that he participated in the decision to lay off any employees. According to J. Felsenthal, he "just presented all the facts, and the decision was made further on." Don Felsenthal, contrary to the testimony of his son, stated that the decision to terminate Dorsey, Wright, and Williams was made jointly by himself, his son, and Chasen.

hearing, undergone the training program, he said that there was one person who had started it. When asked to describe the training program, D. Felsenthal stated that the individual undergoing training, Marilyn Forehand, was doing shoe bags, closing, binding around, and zipper work.[60] When asked how long the training period was to last, he was unable to answer, stated only that "as long as she shows improvement, we will continue to go along with her." When pressed further as to how the training was being done, D. Felsenthal explained that the supervisor works with her but not constantly; rather the new girl has to work a lot on her own to develop speed and technique. When asked to be more specific as to whether the supervisor works closer to 7 hours or closer to 1 hour per day with the trainee, D. Felsenthal stated that he could not answer that question. He then denied that any training program had been developed, that Respondent had just decided to bring in people to train. He stated that the supervisor could teach girls to sew and train them to do the operation. When asked if the supervisor had been given any guidelines as to how the training program should be run, he replied that she had been training girls for 15 years, whenever Respondent hired girls who had not done sewing in the past. At this point D. Felsenthal was asked how the current training program differed from how training had been done in the past, but was unable to answer directly. He simply stated that whereas Respondent used to recall unproductive employees such as Wright, Dorsey, and Williams it had been decided instead to hire new inexperienced employees and train them.

Donald Felsenthal testified that the decision to lay off Wright, Dorsey, and Williams[61] was made in March to be effectuated in April or whenever Respondent physically started to put merchandise in stock. He stated further that, since their productivity had reached its maximum, they would not be recalled. He testified that he reached the conclusion that these employees had reached their maximum productivity by "asking enough questions in the plant to make sure they were at their maximum. . . ."[62] "I wanted to make sure their productivity was the best they could do." It was decided "to go into training programs in the future" if new operators were needed.

With regard to the minimum production standards, I found Donald Felsenthal's testimony singularly unconvincing in a number of particulars. First, that the production of certain operators producing 18 to 20 percent below what they should have been producing could go undetected by supervisors for years is incredible in light of the fact that each operator's daily output had been written down on slips, handed in, and recorded. It hardly takes an analytical genius or even one with an accounting degree to simply add up the slips to determine who is producing and who is not.[63] The fact is that Respondent was aware for years who were the better producers and who were not and nevertheless recalled the poorer producers when it needed additional operators.

Similarly, D. Felsenthal's statement that he "asked enough questions in the plant to make sure they were at their maximum. . . ." "I wanted to make sure their productivity was the best they could do" is incredible in light of the fact that he did not ask the producers themselves whether or not they were producing at their highest level. Quite obviously, Felsenthal could have cared less whether or not they could increase their production once it was determined at a later date that their status should be "permanently laid off."

As for Don Felsenthal's statement that it was decided to institute a training program, James Felsenthal testified that Respondent has not instituted a training program. According to James Felsenthal, Respondent is doing basically the same thing as it had done before; i.e., merely having a supervisor sit down with a new operator and instruct her as necessary. The original emphasis on a new training program, much watered down in later testimony, appears to be a mere window dressing urged to make it appear more reasonable for Respondent to have terminated experienced operators in favor of hiring inexperienced ones.

Al Chasen was also called by Respondent to testify concerning the layoffs. He was asked whether Dorsey, Williams, and Wright were informed at the time of their layoffs that the layoffs were permanent. His reply was that they should have been told by their supervisor, Glenda McCain. Chasen testified that he told McCain that Respondent could no longer use them, that it was just too costly to keep them. Since McCain was not called to testify in support of this alleged discussion,[64] I draw the adverse inference that McCain would not support Chasen's testimony. Chasen testified that it was his intention to permanently lay off the three employees in question plus one other, but could not remember when the decision to do so was reached. Chasen's supposed conversation with Glenda McCain is clearly contradicted by the three discriminatees, one of whom testified that McCain told her that she would be laid off for 4 days, the second of whom testified that McCain told her that she would be laid off for a week, and the third of whom testified that McCain told her that she would be recalled.

Though Chasen testified that he told McCain that Respondent could no longer use the three alleged discriminatees, that it was just too costly to keep them, he admitted that he never spoke to any of the employees in either the tops and bottoms department or in the hanger department about their production. He testified that he talked to the supervisor about that but once again the supervisor, Glenda McCain, did not testify.

Concerning production standards, Chasen testified, somewhat contrary to the Felsenthals, that Respondent "really had standards all along;[65] but there were times

[60] Chasen identified Forehand as the wife of one of Respondent's oldest employees who works in travel bags not shoe bags. He stated that she previously worked for Respondent in the cutting room. Forehand, though considered perhaps a trainee was not, according to Chasen, treated any differently than "trainees" had been treated in the past.

[61] Another employee, Emma Walker, not alleged as a discriminatee was also scheduled for layoff at the same time.

[62] D. Felsenthal testified that his questions were directed primarily to Chasen.

[63] Al Chasen testified that he always knew what the standard was by the number of dozens turned out per day.

[64] No reason was offered as to why she was not called to testify.

[65] They testified that there had been standards in the hanger department but not in the tops and bottoms department.

when we had to build up some production, and we called in people who had some knowledge of it, rather than start from scratch." Chasen then explained that, although he had never instituted a specific standard, "everybody knew what they had to produce." He agreed, however, that he never told an employee that she had to produce or be fired. In describing Wright, Dorsey, and Williams, he said that they were fair workers but not productive workers and that they had been laid off and rehired several times because when Respondent needed production badly enough they were called back even though they were slower than the others.

With regard to the magic figure, $2.50, which J. Felsenthal testified was the established minimum production standard, the following testimony was adduced through Chasen:

> Q. The $2.50, do you know what that would mean to an operator in the tops and bottoms department?
>
> A. It would be below what most of the others were making—far below.
>
> Q. All right. Was that a production standard; do you know?
>
> A. No, it was not.

Although Chasen simply may not have understood the question, it would appear that the Felsenthals never advised him of the significance of the $2.50 minimum production standard. Thus, the Felsenthals not only kept this vital information from their operators, but they also kept the plant manager in the dark about it.

Chasen testified further as to the standard in the tops and bottoms department:

> A. In the tops and bottoms the standard over there, I know what the standards should be about.
>
> Q. What is that standard?
>
> A. Well, the standard would bring them up to about, oh, in dozens, they would have to do about 16 dozens a day to meet a standard—14-16 dozen, depending on the price—they would have had to try to earn at least the minimum in dollars.
>
> * * * * *
>
> Q. You say that in the tops and bottoms department, the production standard is between 12 and 16 bundles; is that right?
>
> A. I haven't got a standard set as to how many bundles.
>
> Q. Is there any standard in the tops and bottoms. . .?
>
> A. No, there isn't. I don't know how many bundles; I know there are girls that turn out anywhere from, as you have just mentioned, 12, 14, 16, 18, 20, 22. . . .
>
> Q. Okay. But, there is no production standard?
>
> A. Not per se.

With regard to the "trainee program" Chasen was anything but supportive of the Felsenthals.

> Q. You have these people that are marginally productive machine operators that don't meet these standards?
>
> A. Yes.
>
> Q. Okay. That have been laid off?
>
> A. Yes.
>
> Q. And, I believe you testified that if you need some work, you'll even call back somebody to get the work out?
>
> A. Right. When we're hard up for production, I will call them back, rather than start a trainee program, which would be very costly—more costly than even the loss we take on these.

Thus, Albert Chasen, the plant manager, testified that rather than train new operators, the laid-off marginal employees are still recalled. Obviously, Chasen was never made aware of Respondent's alleged change in policy. I find his testimony most destructive to Respondent's position.

At the risk of belaboring the point, there is also the following testimony of Chasen:

> Q. Have you ever instituted a training program at Earle Industries?
>
> A. No, not really.
>
> Q. Has there ever been a discussion regarding a training program at Earle Industries.
>
> A. No. . . .

This is the individual who oversees the progress of employees at the plant and who decides that, if they show no progress, "he will have to let them go." Thus, from his own testimony it would appear that, if anyone knows about production at the plant, it is Chasen, for he is in charge. Yet, the Felsenthals never discussed with him the planned "training program" for the future. That is incredible!

Respondent called Jonell Bennett to testify concerning production, primarily for the apparent pupose of explaining that Louise Robbins was kept on the payroll despite poor production because she had been engaged in repair work much of the time so that her total production or lack thereof would not truly reflect her ability to produce. This, it was hoped, would show that there was no disparate treatment as between Robbins and the three alleged discriminatees laid off on April 6. However, when Bennett was through explaining by means of several sets of 1979 timecards[66] how Robbins had been engaged in repair work much of the time, she was then subjected to cross-examination with regard to these same timecards. It then came out in her testimony that one employee whose production was being compared to that of the three discriminatees had failed to make production 11 of the 13 weeks[67] she worked in production and that Louise Robbins failed to make production during any of the 12 weeks she worked on production. Moreover, by using the information offered during Bennett's testimony and analyzing the timecards, it becomes apparent that Rob-

[66] The timecards of only five employees were offered into evidence.

[67] Two weeks were spent solely on repair.

bins' production, though better than Williams', was much poorer than Wright's or Dorsey's.[68] There is, therefore, disparate treatment since Robbins was kept working despite the fact that her piecework production was poorer than two of the three discriminatees claimed to have been permanently laid off for failure to meet production. One might also infer that the reason that Robbins was put on repair work so much is that she was not productive on piecework.

All three of the employees laid off on April 3-4, 1979, were called to testify with regard to their production and production in general. Virgil Wright was called to the stand and testified that she did not make production between 1969 and 1979 except for about a month before she was laid off.[69] She denied that she had an opportunity to make production because she was put on repairs. She testified further that, when she was doing repairs, none of the other employees were doing repairs. When Wright was asked when it was that she had been doing repairs, she replied that it was in 1976, 1978, and 1979. No records were offered by Respondent to dispute her claim as to 1976 or 1978, nor were witnesses called to contradict her with regard to her claim insofar as these years are concerned. I therefore credit her testimony. Respondent's records, i.e., timecards, were introduced by Respondent showing which operations Wright performed in 1979. These reveal no evidence that Wright performed any repair work in 1979. Similarly, no witnesses were called to support Wright's testimony on this score.[70] I find therefore that Wright performed no repair work in 1979 as she had done previously.

When asked why she failed to make production during periods when she was not assigned repair work, Wright testified that this was because she was not permitted to continue to work on a single operation but had her work changed on her, and she lost time changing the color of the thread she had to use. She admitted, however, that other operators had their work changed as well,[71] though the operators who made production asked for whatever they wanted to sew and refused other work. This testimony was substantiated by Morton who worked as floorgirl supplying the operators. According to Morton, "The fastest girls in the plant . . . certain girls in the plant, I don't care what you'd do, they would not sew it, they'd say, I'm not sewing it . . . and we'd have to take it up . . . it was certain girls in that plant, if they didn't want to sew what—they got choice work." Thus, Wright's testimony was supported by Morton's to the effect that production was influenced by the operator's willingness to accept or refuse assigned work.[72]

Wright testified that she was never told that she had to produce a minimum standard. She usually produced eight or nine bundles per day and she considered that to be her standard. In this regard, Wright credibly testified that she had never been counseled for bad performance. She was never told that she was not making standard or that her productivity was low.

Mary Dorsey testified with regard to her production that she was never told by any supervisor either that she was a bad worker or that her productivity was low. She, unlike certain other employees, was apparently not interested in pushing for greater production since she never bothered to figure out in advance what her expected weekly paycheck might be based on the piece rates. Nor did she discuss with other employees their earnings based on production. She was aware, of course, that her income could be increased by increasing her production, but only did her best, never questioned whether or not she was receiving the proper amount, but "just worked and got my check." She received the minimum wage since she did not make production.

Though Dorsey did not produce sufficiently to receive above the minimum wage, she did produce above the minimum production standard of $2.50 during 1979. During the week of January 12 her production was $2.52, for February 2—$2.51, for February 16—$2.76, for March 2—$2.61, and for March 9—$2.52. Donald Felsenthal admitted that Dorsey did, in fact, exceed the production standard during these weeks.

Carolyn Williams testified that in 1979 she was paid $2.90 per hour, the minimum wage. She testified also that she had never been told by any supervisor at the plant that she was a bad worker or counseled or taken into the office and talked to about her productivity. Respondent's records indicate that during the week ending March 2 Carolyn Williams' production level was at $2.52, that during the week of March 9 it was also at $2.52, and that during the week of March 16 she worked at a production level of $2.62. Donald Felsenthal confirmed in his testimony that Williams' production was above standard during these periods.

In summary, Respondent's position with regard to Wright, Dorsey, and Williams is that they were permanently laid off on April 3-4 because they were unable to meet production standards. This was the testimony of both the Felsenthals and Chasen. To support this position Respondent's witnesses testified that James Felsenthal established a $2.50 minimum production standard and thereafter convinced his father, Donald Felsenthal, to terminate those employees who were unable to consistently make the minimum standard unless there was a

[68] The code 10-03 appearing on the employees' timecards indicates the difference which Respondent had to pay to the particular employee for her failure to make production during a given week. By dividing that sum (loss to the Company) by the total number of hours worked on piecework during that particular week, one can arrive at the cost per hour to the Employer caused by that employee's failure to make production while doing piecework.

[69] Company records (G.C. Exh. 13) indicate that Wright exceeded the $2.50 mark during the weeks of February 16, March 2, March 9, and April 6. D. Felsenthal admitted that the records were accurate.

[70] Mary Dorsey testified that Wright did repairs but did not testify as to when she did them.

[71] Gladys Conners confirmed this statement in her testimony.

[72] If Respondent's management were interested in increasing production, its members could have asked for an explanation from the operators why certain of them produced more than others. This explanation, uncontroverted, could have been of value to them in determining the reasons for the differences. Respondent's management did not bother to investigate. Rather, decisions to permanently lay off certain employees were made without first determining why differences in production existed. This, in my view, is evidence, not of a desire to increase production, but of a different motive.

legitimate reason why they were unable to do so. To determine whether there was some legitimate reason to keep an unproductive employee, J. Felsenthal testified that he discussed the matter with Supervisor Glenda McCain. He also supposedly asked her opinion as to whether she thought any of the less productive employees were capable of improving their output. Based on the minimum production standard and the report of Glenda McCain, Respondent contends that it permanently laid off Wright, Dorsey, Williams, and three other individuals.

I cannot and do not accept Respondent's position as credible. I find that Wright, Dorsey, and Williams were laid off temporarily with the full expectation of being recalled at a later date when work picked up. All of Respondent's own personnel records and other documentation clearly reflects this to be the case. This is what the three discriminatees were told and there is no evidence to the contrary in the documentation or in statements made to them at the time of their layoffs. Indeed, production or lack thereof was never a consideration in the decision of management to lay them off nor was there any indication given at the time that the layoffs were permanent.

I consider Respondent's minimum production standard a device synthesized at a later date in order to support its position with regard to its challenges to the ballots of Wright, Dorsey, and Williams in order to undermine the Union's majority status in violation of Section 8(a)(1) and (3) of the Act. I find Respondent's contention that it permanently laid off Wright, Dorsey, and Williams because they failed to meet the minimum production standard unworthy of crediting for the following reasons:

1. James Felsenthal's description of how he arrived at the $2.50 minimum production standard was too superficial, lacked documentation, and appeared more conclusionary than scientifically economic.

2. James Felsenthal's purported discussion with Glenda McCain concerning why Dorsey, Wright, and Williams should be terminated while other even less productive employees should be kept was never corroborated by Supervisor McCain. I therefore draw the adverse inference that McCain would not have supported James Felsenthal's testimony if called upon to do so.

3. No one from management ever discussed with the operators the so-called newly instituted minimum production standard, documented its existence, or communicated it to its employees, an obviously necessary step if Respondent hoped by the institution of the new system to increase production.

4. No one from management ever told Wright, Dorsey, or Williams at the time of their layoffs that they were being permanently laid off but, on the contrary, management told them that their layoffs were temporary and that they would be recalled.

5. Other employees, e.g., Robbins and Childs, who also failed to make the minimum productive standard were retained while Wright, Dorsey, and Williams were laid off. If failure to produce the minimum standard were the reason for the layoffs, they all would have been terminated. Despite Respondent's claim to the contrary, the fact that Robbins did some repair work had nothing to do with her failure to produce at the minimum standard for the records for repair work and for piecework were separately kept and, even when Robbins was on piecework alone, she did not make the minimum production standard. Robbins, in fact, produced at a rate even lower than either Wright or Dorsey but was nevertheless retained.

6. Similarly, employee Childs was also retained despite her failure to produce at or above the minimum production standard and, although Respondent claims that she was kept because her supervisor said she was versatile, her supervisor, Glenda McCain, was never called to testify to this fact on the stand. Here also an adverse inference is warranted and drawn.

7. Once Respondent utilized the minimum production standard as a basis for claiming that Wright, Dorsey, and Williams had been permanently laid off and were ineligible to have their ballots counted, James Felsenthal and Respondent seemed to have lost interest in its continued implementation, thus indicating that its purpose was limited to its immediate use as a pretext. In 1980 three employees who produced below the minimum production standards were retained by Respondent without explanation.

8. Felsenthal's testimony that supervisors could not detect the fact that Wright, Dorsey, and Williams were not productive until the February 1979 analysis was made is patently absurd. Since production slips were always used to record each employee's production, it is quite obvious that Respondent was aware for years that Wright, Dorsey, and Williams were among the poorest producers but nevertheless rehired them over and over again whenever there was a need for additional production because it was, as Chasen testified, cheaper than training completely new employees. Clearly, from the evidence discussed above, Respondent in April 1979 intended to do exactly the same thing again, i.e., to lay them off and recall them later. It was only in June 1979 when they tried to cast their ballots that Respondent attempted to convert the earlier temporary layoffs to permanent layoffs that Respondent questioned their production and attempted to argue that it became aware for the first time that they were not Stakhonovites.

9. The testimony of Donald Felsenthal to the effect that a training program was planned for the future whereby new employees would be hired and trained instead of Respondent rehiring older less productive employees, as was done in the past, is not credited. The training program was, in my opinion, offered solely as a means to give credence to Respondent's otherwise untenable proposition that it planned no longer to rehire experienced sewers but to hire totally inexperienced personnel, then train them to be producers. Felsenthal's testimony was inconsistent throughout his discussion of the planned training program until he finally admitted that no such training program had been implemented and what little training that was being done was, in fact, no different from under the old system. His admission that the so-called training program was never discussed with the plant manager clearly indicates that the concept of a

new training program was an imagined one used by Respondent as window dressing.

10. Felsenthal's position that he had reached a legitimate conclusion that Wright, Dorsey, and Williams had reached their maximum productivity is patently untenable since the means he allegedly used is clearly factitious. Thus, he claimed that he had reached this conclusion by "asking enough questions" around the plant, presumably from Chasen, yet he never asked the operators themselves why they were not producing more nor told them they were subject to termination unless they improved their production. Moreover, an analysis of their production throughout 1979 would suggest that the opposite conclusion should have been drawn for sometimes these employees produced in excess of the minimum production standard and at other times they did not. This fact suggests that under certain conditions they could produce far more than under other conditions. If Felsenthal were primarily interested in increasing production, he could have asked them why their production varied from one week to another. One must conclude that increased production was not a consideration but a mere afterthought.

11. Respondent failed to call Glenda McCain to testify to support Chasen's self-serving testimony that he told her at the time of the layoffs that they were permanent. I draw the adverse inference that, had McCain been called, she would not have corroborated Chasen. Similarly, failure to call her to confirm his self-serving testimony that the two of them had discussed the production of the laid-off employees convinces me that no such discussion took place.

12. Chasen, the plant manager who was in charge of production, never told the laid-off employees to either produce or face termination.

13. Chasen testified that unproductive employees were historically rehired because it was cheaper than training new employees and there is absolutely nothing in the record to indicate that, at the time of the layoffs, Respondent did not intend to continue this policy.

14. All of the documentation from Respondent's personnel files indicate that Wright, Dorsey, and Williams were laid off for lack of work.

15. Chasen contradicted the testimony of the Felsenthals by admitting that there was no $2.50 minimum production standard or any other specific standard in the tops and bottoms department. His testimony means that the Felsenthals made up the existence of the minimum production standard out of whole cloth after the layoffs or simply never bothered to tell the plant manager, the individual in charge of production, of its existence. The latter's possibility is an absurdity. The former makes sense if the manufacture of the minimum production standard after the layoffs was a pretextual conception invented to provide an appearance of legitimacy for Respondent's challenge to the ballots of the prounion employees at the representation election. I conclude that this is what happened.

After Respondent unlawfully converted the temporary layoffs of Wright, Dorsey, and Williams to permanent layoffs, all three sought reemployment with Respondent. Wright[73] went to the plant on two occasions and spoke to Bennett to see if work was available. On both occasions Bennett stated that Respondent was not hiring at the time. She did not tell Wright either that she had been permanently laid off or that she would never be recalled or rehired. Since I have rejected Respondent's position that Virgil Wright was permanently laid off for lack of production, but on the contrary was temporarily laid off for lack of work with an expectation of recall, and since it has historically been Respondent's practice to contact laid-off employees when work was available rather than necessarily requiring them periodically to visit the plant to request rehiring, I find that it was and is unnecessary that Wright continue to visit the plant to seek employment. I shall recommend that Respondent take the initiative to recall Wright for reemployment as soon as work becomes available and to do so immediately if work has already become available since her temporary layoff.

Mary Dorsey testified that after her layoff in April 1979 she went to the plant once and telephoned twice seeking employment. When she visited the plant she spoke with Jonell Bennett and when she called she did not inquire as to whom she was speaking. As with the case of Virgil Wright, I have found that Mary Dorsey was temporarily laid off with an expectation of recall. For reasons already stated, I find it unnecessary for Dorsey to continue to physically and actively inquire about the availability of employment at Respondent's plant, but shall recommend that Respondent be required to take the initiative to recall Dorsey for reemployment as soon as work becomes available and to do so immediately if work has already become available since her temporary layoff.

Carolyn Williams visited the plant once seeking reemployment since her layoff in April 1977, and telephoned about three times. Each time she spoke with Bennett[74] who advised her, in reply to her request for employment, simply that Respondent was not hiring at the time. No mention was made to Williams that she had been permanently laid off or fired, nor was she told that she was not eligible to be rehired.

Once again, as with Wright and Dorsey, I find it unnecessary that Williams should have to continue to inquire about reemployment. Rather, I shall again recommend that Respondent be required to take the initiative and contact Williams to offer her reemployment as soon as work becomes available and to do so immediately if work has already become available since her temporary layoff in April 1979.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent as set forth in section III, above, occurring in connection with the operations of

[73] Bennett testified that Wright may have come back to the plant to seek employment but was not certain. Chasen testified that as far as he knew none of the "permanently laid off employees" ever came back to seek employment.

[74] Bennett's testimony that she received no calls from Wright, Dorsey, or Williams is not credited in light of Williams' statement to the contrary. Bennett could not recall Williams visiting the plant to seek reemployment.

Respondent as set forth in section I, above, have a close, intimate and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Earle Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By converting the temporary layoffs of Early Morton, Carolyn McClain, Virgil Wright, Mary Dorsey, and Carolyn Williams to permanent layoffs in order to prevent their favorable votes for the Union, Respondent thereby has terminated their employment and has violated Section 8(a)(3) and (1) of the Act, as amended.
4. Respondent has not violated Section 8(a)(4) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3), of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take appropriate and affirmative action designed to effectuate the policies of the Act. In particular, as I have found that employees Early Morton, Carolyn McClain, Virgil Wright, Mary Dorsey, and Carolyn Williams were permanently laid off in violation of the Act and thereby discriminatorily terminated, I shall recommend that Respondent be required to offer them full and immediate reinstatement, with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[75]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[76]

The Respondent, Earle Industries, Inc., Earle, Arkansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from permanently laying off or otherwise discriminatorily terminating employees in order to prevent them from casting their ballots in National Labor Relations Board union representation elections or in any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.
2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Early Morton, Carolyn McClain, Virgil Wright, Mary Dorsey, and Carolyn Williams immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for their loss of earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its offices in Earle, Arkansas, copies of the attached notice marked "Appendix."[77] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's authorized representative shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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[75] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[76] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[77] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."